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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA - FRESNO DIVISION

In re

HECTOR GONZALEZ AND ROSA
GONZALEZ,

Debtor(s).

WELLS FARGO BANK, NA,

Movant,

vs.

HECTOR GONZALEZ AND ROSA
GONZALEZ, Debtor(s); MICHAEL H.
MEYER, Chapter 7 Trustee,

Respondents.

Case No. 09-14454-A

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

LBR 4001-1 and 9014-1(f)(1)

DATE: June 22, 2010
TIME: 1:30 p.m.
CTRM: 11

2500 Tulare Street,
Fresno, CA 93721-1318

Wells Fargo Bank, NA¹ ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C. § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its security interest in real property generally described as 5524 West Indianapolis Avenue, Fresno, California 93722.

¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Pite Duncan, LLP's participation in this proceeding. Moreover, the within party does not authorize Pite Duncan, LLP, either expressly or impliedly through Pite Duncan, LLP's participation in this proceeding, to act as its agent for purposes of service under Fed. R. Bankr. P. 7004.

1 On or about May 15, 2009, Hector Gonzalez and Rosa Gonzalez ("Debtors") filed a
2 voluntary petition under Chapter 13 of the Bankruptcy Code. On or about May 4, 2010, said case
3 was converted to one under Chapter 7 of the Bankruptcy Code, and Beth Maxwell Stratton was
4 appointed as Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against
5 Debtors and the bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

6 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I.**

9 **MOVANT IS ENTITLED TO RELIEF FROM THE**
10 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

11 **NO EQUITY**

12 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
13 debtor does not have any equity in the property and the property is not necessary to the debtor's
14 effective reorganization.

15 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:
16 § 362(d)(2) reflects congressional intent to allow creditors to
17 immediately proceed against the property where the debtor has no
18 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

19 Id. at 610 (emphasis added).

20 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
21 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
22 encumbrances are totaled, whether or not all the lienholders have joined in the request for relief from
23 stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th Cir.
24 1984).

25 An appropriate cost of sale factor should also be added to determine if the debtor has any
26 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
27 (Bankr. S.D. Cal. 1982).

1 On or about May 26, 2005, Debtors, for valuable consideration, made, executed and
2 delivered to Movant a Note in the principal sum of \$218,800.00 (the "Note"). Pursuant to the Note,
3 Debtors are obligated to make monthly principal and interest payments commencing July 1, 2005,
4 and continuing until June 1, 2035, when all outstanding amounts are due and payable. The Note
5 provides that, in the event of default, the holder of the Note has the option of declaring all unpaid
6 sums immediately due and payable. A true and correct copy of the Note is attached to the
7 concurrently served and filed Exhibits to the Declaration in Support of Motion for Relief From
8 Automatic Stay ("Exhibits") as exhibit A and incorporated herein by reference.

9 On or about May 26, 2005, the Debtors made, executed and delivered to Movant a Deed of
10 Trust (the "Deed of Trust") granting Movant a security interest in real property commonly described
11 as 5524 West Indianapolis Avenue, Fresno, California 93722 (the "Real Property"), which is more
12 fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
13 incurred as a result of the Debtors' bankruptcy case may be included in the outstanding balance
14 under the Note. The Deed of Trust was recorded on June 8, 2005, in the Official Records of Fresno
15 County, State of California. A true and correct copy of the Deed of Trust is attached to the Exhibits
16 as exhibit B and incorporated herein by reference.

17 Subsequently, Lender's beneficial interest in the Deed of Trust was sold, assigned and
18 transferred to Movant. A true and correct copy of the Corporation Assignment of Deed of Trust
19 evidencing the Assignment of the Deed of Trust to Movant is attached to the Exhibits as exhibit C
20 and incorporated herein by reference.

21 The obligation under the Note is in default as of September 1, 2009, for failure to make
22 payments to Movant. As of May 13, 2010, the total obligation due and owing under the Note is in
23 the approximate amount of \$216,979.88, representing the principal balance of \$206,317.61, interest
24 in the sum of \$9,691.29, accumulated late charges in the amount of \$131.18, escrow advances in the
25 amount of \$79.35, and a recoverable balance of \$760.45. This is an approximate amount for
26 purposes of this Motion only, and should not be relied upon as such to pay off the subject loan as
27 interest and additional advances may come due subsequent to the filing of the Motion. An exact
28 payoff amount can be obtained by contacting Movant's counsel. Further, Movant has incurred

1 additional post-petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total
2 arrears under the Note are in the approximate sum of \$12,359.63, excluding the post-petition
3 attorneys' fees and costs incurred in filing the instant Motion.

4 **II.**

5 **RELIEF FROM STAY**

6 **LACK OF EQUITY**

7 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and
8 Statements, the fair market value of the Property is approximately \$135,072.00. True and correct
9 copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as
10 exhibit C and incorporated herein by reference.

11 Based on the above, Movant maintains that the equity in the Property is as follows:

12	Fair Market Value:	\$135,072.00
13	Less:	
	Movant's Trust Deed	\$216,979.88
14	Wells Fargo Bank, NA – 2 nd Deed of Trust	\$49,893.00
	Costs of Sale (8%)	<u>\$10,805.76</u>
15	Equity in the Property:	\$<142,606.64>

16 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
17 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
18 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).

19 **III.**

20 **MOVANT IS ENTITLED TO RELIEF FROM THE**
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

21 **CAUSE - LACK OF ADEQUATE PROTECTION**

22 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate
23 protection of its interest in the Property.

24 Movant submits that adequate protection in this case requires normal and periodic cash
25 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
26 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

27 Movant is informed and believes that Debtors are presently unwilling or unable to provide
28 adequate protection to the Movant and there is no probability that adequate protection can be

1 afforded to Movant within a reasonable time.

2 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
3 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

4 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

5 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
6 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

7 2. That the 14-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

8 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
9 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
10 the Property;

11 4. Permitting Movant to offer and provide Debtors with information re: a potential
12 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
13 Mitigation Agreement, and to enter into such agreement with Debtors;

14 5. Alternatively, in the event this court declines to grant Movant the relief requested
15 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
16 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
17 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay
18 when due (a) the monthly installments of principal and interest, as required under the Note;
19 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to protect
20 Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the filing of this
21 motion;

22 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
23 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law; and

24 7. For such other and further relief as the court deems just and proper.

25 Dated: May 19, 2010

PITE DUNCAN, LLP
/s/Joseph C. Delmotte (CA SBN 259460)
JOSEPH C. DELMOTTE
Attorneys for WELLS FARGO BANK, NA